Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

81-15

IN THE

Supreme Court of the United States

October Term, 1981

No. ____

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Petitioners,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS

1. Is a municipality responsible in damages where it grants a building permit to rebuild fire damaged premises (though extorting an unlawful limitation thereon), then unilaterally revokes said permit after a great deal of work has been done thereunder, and where the ultimate determination of the highest Court in the State, finds (9 years later) that on the record, the revocation was improper?

2. Has there been an unconstitutional taking of private property without due process (failure to at least hold a hearing before the unlawful revocation) and without just compensation; for which taking the municipality is responsible in damages?

3. Is a municipality liable in damages where it compels, improperly and under duress, a property owner to waive certain property rights in order to obtain a permit to repair fire damaged property?

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PRELIMINARY STATEMENT

Review is sought of a determination of the N.Y. Court of Appeals (59 NY2d 991) dated February 17, 1981, reargument denied April 9, 1981, which found that, on the record, the City had erroneously revoked a Permit to rebuild a fire damaged building belonging to Petitioner, 154 East Park, but affirmed the determination of the Appellate Division, Second Department (73 AD2d 640; Dec. 17, 1979), that affirmed a Judgment of the Supreme Court, Nassau County (June 28, 1978) which ordered the issuance of the Permit but denied damages to the owner. Said Judgment was entered after a remand to the Supreme Court by the Appellate Division (49 AD2d 949, Oct. 28, 1975) of a prior Judgment of the Supreme Court made February 13, 1974, for a hearing to be held on whether fire damage exceeded half the market value since the evidence did not support the conclusion of the Trial Court that fire damage exceeded half of the cubical content of the building. The award of damages to the plaintiff was reversed.

Jurisdiction is invoked under 42 USC 1983 and for the violation of rights specifically granted under the 5th and 14th amendments of the U.S. Constitution. Constitutional issues were raised in the original complaint (Appendix, p. 42, 43) as well as in the two appeals to the Appellate Division and the appeal to the Court of Appeals. None of the tribunals specifically ruled upon the unconstitutional issues raised; thus, by inference, deciding them in favor of the Respondent City.

SUMMARY OF THE FACTS

A brief summary of facts will put into proper perspective the reasons for granting the writ.

January 11, 1972: Fire damages the subject building which concededly has a pre-existing non-conforming use.

The City refuses to grant a Permit to repair the damage unless the number of apartments is reduced from five to three and the top (third) floor removed.

July 5, 1972: Permit is issued by Arthur Zimmerman, the Building Commissioner, upon the owner's so agreeing.

Owner immediately starts to tear off the top floor and take out some of the inside to conform to the conditions agreed upon and expends over $17,000 in the process of so doing.

September 20, 1972: Letter from Corporation Counsel to Building Commissioner, ordering Commissioner to revoke Permit.

September 21, 1972: Without hearing or prior notice, the Permit is revoked.

Owner sues for return of Permit, injunction and damages.

Trial Court finds (Appendix p. 37, 38) that fire damage exceeded 50% of cubical content of building[1], but awarded

[1]The City's Inspectors report made in October 1972 (after revocation) and introduced into evidence, showed that only 40% was damaged. The City then hired an outside engineer who didn't see the property until November 1972, who then reported and testified that more than 50% was damaged.

damages of approximately $5,800 to the Petitioner herein as "consequential damages."

Both sides appealed and the Appellate Division found (Appendix p. 24-26), that the evidence did not support the conclusion that more than 50%, by volume, had been damaged but remanded for trial of the issue of whether more than 50%, in value, had been damaged. It also reversed the award of damages.

Upon trial on the remand, the Trial Court found (Appendix, p. 23) that less than 50%, in value, had been damaged and directed the Permit to re-issue but refused to award damages. The City did not appeal the Judgment directing Permit be issued but Petitioner appealed and the Appellate Division (Appendix, p. 15) affirmed the determination that denied damages. The Petitioner took his cause to the Court of Appeals which found (Appendix, p. 8) that the record established that the revocation was erroneous but that the Appellate Division was correct in rejecting the claim for damages.[2]

[2]Nine years had elapsed in which taxes were paid continuously but income was nil for all of said period because the Permit to rebuild was wrongfully revoked and withheld.

REASONS FOR GRANTING THE WRIT

The New York courts have completely misunderstood or ignored the Constitutional issues raised by Petitioner from the very inception of the matter.

The Building Commissioner legally issued a Building Permit. After Petitioner expended a substantial amount of money and gave up the right to reconstruct the building to its former use exactly, the Permit was unilaterally revoked, without notice, cause or hearing. The City's own inspector (supra) found (after Revocation) that there was less than 50% damages (50% being the point at which the existing statute said the City had the right to refuse reconstruction of a non-conforming use). Two trials and three appeals proved conclusively that the revocation had no legal basis, that result being finally capped by the short opinion of the Court of Appeals (Appendix, p. 8). No logical legal basis for revocation was ever offered by the City except the very equivocal post-revocation engineer's report which was not accepted as sufficient by the Courts and was in direct conflict with City's own qualified inspector's report.[3]

To give immunity from liability for such wrongful or erroneous acts as these, would deprive a person of his property and rights without due process and unlawfully restrict private property usage without just compensation. It would encourage misuse of police powers by whim, malice, ignorance or sheer carelessness.

---

[3]There is no specific statutory authority for the revocation by a municipality or its officers of a valid permit which authorizes, in effect, the common law right of an owner to use his property as he requests in his application for the Permit. Sec. 7-19 of Building Code of the Respondent City states that the Commissioner may revoke any permit "where it has been found that false statements or any misrepresentations" had been used to obtain same.

The basic case quoted by the Appellate Courts in New York to support their findings is *Rottkamp v. Young*, 21 AD2d 373, affd. 15 N.Y. 831. It is factually very different from the instant case. In *Rottkamp* no permit was granted and that raised the issue. In the instant case a Permit was issued and subsequently revoked after it had been acted upon. And the New York courts, herein, have conclusively held that the City had no right or basis for its revocation, that, in effect, the original issuance was entirely proper and valid.

On affirming *Rottkamp* in a four to three vote in the Court of Appeals, Judge Burke stated in the minority opinion

> "While sound policy reasons underlie the extension of immunity to those officials charged with making decisions *common to both the judicial and legislative organs of government*, these considerations provide no license for the intentional misuse of power by such administrative officers as building inspectors." (15NY 2d at 835). (Emphasis in original)

Judge Burke also stated at page 833:

> "With the exception of California———all other jurisdictions in this country, in common with the overwhelming number of jurisdictions in the free world, take the position that malice or dishonesty of purpose can transform an otherwise privileged act of an administrative official into one for which personal liability may ensue———"

This Court stated in *Scheuer v. Rhodes*, 416 U.S. 232, at 247-248:

> "[I]n varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the

> circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith beliefs, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

More recently this Court even went so far as to advance the proposition that "good faith" plays no part in the assertion of limited immunity under 28 USCA 1983 (*Owen v. City of Independence,* 445 U.S. 624). And the observations set forth at 11 N.Y. Jurisprudence 2d Sec. 37, 38 cloaks the holder of a building permit with constitutionally protected rights when it states that a Building Permit may not arbitrarily be revoked and that:

> "Under certain circumstances, the holder of a building permit may obtain vested rights which preclude revocation of the permit. The doctrine of "vested rights" is a constitutional doctrine, deriving from the Fourteenth Amendment which involves fundamental fairness..."

It is argued that the Petitioner had a vested right under the permit since it had expended substantial sums in reliance thereon, had acted in good faith throughout, had agreed with the Respondent to waive certain rights and had no hearing with respect to the revocation.

Every property owner, every business man and any one needing a permit or license from a municipality wherein the slightest degree of discretion would be required to obtain same, would be imperiled in the event that the public official acted improperly or in an arbitrary and capricious manner if permits could be willy-nilly revoked once issued. From the public's point of view, executive stability would be seriously questioned.

While a municipality may be immune, in some cases, from damages for the discretionary acts of its executive officers, to extend that immunity to cover an arbitrary subsequent change of mind, would imperil the orderly function of government which should be for the protection of private rights in the context of proper legal restrictions. To wilfully subject a person to an arbitrary governmental whiplash, giving and revoking Permits (especially when the Courts find the revoking is improper, as herein), thus preventing a lawful rebuilding of a damaged property at a great loss to such person, would create a license in executive officials or communities, to take private property without due process or just compensation.

CONCLUSION

A Writ of Certiorari should issue to the N.Y. State Court of Appeals directing a remand to the Trial Court for the purpose of assessing the damages to the Petitioner caused by the City of Long Beach and for Judgment thereon.

Respectfully Submitted,

SEYMOUR M. CUSTEN
Attorney for Petitioner
116 East Park Avenue
Long Beach, N.Y. 11561

July 1981

APPENDIX

52 New York 2d 991

154 EAST PARK AVENUE CORP. et al.,

Appellants,

v.

CITY OF LONG BEACH et al.,

Respondents.

Argued January 6, 1981; decided February 17, 1981

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 17, 1979 (73 AD2d 640), which affirmed a judgment of the Supreme Court, entered in Nassau County, thereby bringing up for review an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 28, 1975 (49 AD2d 949), which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (BERTRAM HARNETT, J.; opn 76 Misc 2d 445), entered in Nassau County, *inter alia,* declaring the revocation of plaintiffs' building permit valid and proper, denying injunctive relief to plaintiffs, and awarding consequential damages to plaintiffs in the amount of $5,785.32. The modification consisted of striking the abovementioned provisions of the judgment and remanding the matter to Special Term for a hearing on the issue of whether fire damage to plaintiffs' building exceeded more than one half of its market value prior to the fire (and thus whether the building permit was properly revoked under a city ordinance). Plaintiff

corporation owned a building in the City of Long Beach which was damaged by fire in January, 1972. The building had a nonconforming use at the time of the fire, and although plaintiff was originally issued a building permit to restore the building to its prior nonconforming use, the permit was subsequently revoked on the ground that it was issued in violation of a city ordinance, which provided that a damaged nonconforming building could only be repaired and restored to its nonconforming use if damaged to the extent of less than one half of its value. The trial court found that the revocation was proper since the damage to the building exceeded one half its value, but awarded damages to plaintiffs for moneys expended in reliance on the original building permit. The Appellate Division concluded that the trial court's determination was not supported by the evidence; that there should be a hearing on the issue of whether the damage to the building exceeded one half of its market value, and that the award of damages to plaintiff as a result of the erroneous issuance of the permit was improper (*Rottkamp v Young*, 21 AD2d 373, affd 15 NY2d 831).

154 East Park Ave. Corp. v City of Long Beach, 49 AD2d 949, 73 AD2d 640, affirmed.

APPEARANCES OF COUNSEL

Charles D. Maurer and *Seymour M. Custen* for appellants.

Eli Kramer, Corporation Counsel (Samuel Ungar of counsel), for respondents.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division appealed from, and prior order of the Appellate Division brought up for review, should be affirmed, with costs.

Although it is established on this record that the respondents' revocation of the building permit was erroneous, the Appellate Division nonetheless was correct in rejecting plaintiffs' claim for damages. The revocation was a discretionary act for which neither the municipality nor the building inspector will be held liable (*Rottkamp v Young*, 21 AD2d 373, affd 15 NY2d 831).

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER concur.

Order appealed from and order of the Appellate Division brought up for review affirmed, with costs, in a memorandum.

N.Y. COURT OF APPEALS

(Decision on Motion to Reargue)

2 Mo. No. 362

154 East Park Avenue Corp. & ano.,

Appellants,

vs.

The City of Long Beach and
Arthur Zimmerman,

Respondents.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

COURT OF APPEALS
April 9, 1981

APPELLATE DIVISION ORDER, 12/17/79

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 17, 1979

HON. JAMES D. HOPKINS, *Justice Presiding*
HON. VITO J. TITONE,
HON. FRANK A. GULOTTA,
HON. JOHN P. COHALAN, Jr., *Associate Justices*

---X

154 EAST PARK AVENUE CORP. et al.,

Appellants,

v.

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Respondents.

---X

ORDER ON APPEAL FROM ORDER AND JUDGMENT

In the above entitled action (1) to permanently enjoin defendants from preventing plaintiffs from reconstructing certain premises and (2) for money damages, the above named 154 East Park Avenue Corp. et al., plaintiffs, having appealed to this court from so much of (1) a purported order of the Supreme Court, Nassau County, dated June 23, 1978 (which, in fact, is a decision)

and (2) a judgment of the same court, entered thereon on June 30, 1978, insofar as they denied his claim against defendants for money damages; and the said appeal having been argued by Charles D. Maurer, Esq., of counsel for appellants and submitted by Paula E. Kennedy, Esq., of counsel for respondents, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the appeal from the decision is hereby dismissed, without costs or disbursements, and it is further

ORDERED that the judgment insofar as appealed from is hereby unanimously affirmed, without costs or disbursements (see *Rottkamp* v *Young*, 21 AD2d 373, affd. 15 NY2d 831).

Enter:
IRVING N. SELKIN
Clerk of the Appellate Division

JAMES D. HOPKINS, J.P.
VITO J. TITONE
FRANK A. GULOTTA
JOHN P. COHALAN, Jr., JJ.

73 AD2d 640 — A — December 4, 1979

2734 E

154 EAST PARK AVENUE CORP. et al.,

Appellants,

v.

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Respondents.

Charles D. Maurer, Garden City, N.Y. (Seymour M. Custen of counsel), for appellants.

David N. Hilgendorff, Corporation Counsel, Long Beach, N.Y. (Paula E. Kennedy of counsel), for respondents.

In an action (1) to permanently enjoin defendants from preventing plaintiffs from reconstructing certain premises and (2) for money damages, plaintiffs appeal from so much of (1) a purported order of the Supreme Court, Nassau County (MEADE, J.), dated June 23, 1978 (which, in fact, is a decision) and (2) a judgment of the same court, entered thereon on June 30, 1978, insofar as they denied his claim against defendants for money damages.

Appeal from the decision dismissed, without costs or disbursements. No appeal lies from a decision.

Judgment affirmed insofar as appealed from, without costs or disbursements (see *Rottkamp* v *Young*, 21 AD2d 373, affd. 15 NY2d 831).

HOPKINS, J.P., TITONE, GULOTTA and COHALAN, JJ., concur.

December 17, 1979

154 EAST PARK AVE. CORP. v CITY OF LONG BEACH

2734 E

At a Special Term, Part V-B, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Supreme Courthouse, Supreme Court Drive, Mineola, New York, on the 28th day of June, 1978.

PRESENT:
HONORABLE ROBERT C. MEADE,
Justice.

----------X

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Plaintiffs,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Defendants.

----------X

JUDGMENT
Index No. 15084/72

This matter having been remanded by the Appellate Division of this Court for a hearing and determination as to whether the fire damage to the building at 154 East Park Avenue, Long Beach, New York, exceeded more than one-half of its market value prior to the fire of January 11, 1972, and for the entry of an appropriate amended judgment in accordance therewith.

The issues having been tried by Mr. Justice Robert C. Meade, at

Special Term, Part V-E, of this Court, on January 19 and March 3, 1977, and the plaintiffs having appeared by Seymour M. Custen, Esq., and the defendant having appeared by David Schlachter, Esq., by Samuel Ungar, Esq. of counsel, and the allegations and proofs of the respective parties having been duly heard and considered, and due deliberation having been had thereon and upon the decision of the Court, dated June 17, 1977, which specifically found that the fire damage to the subject building did not exceed more than one-half of its market value prior to the fire.

NOW, on motion of Paula E. Kennedy, Esq., attorney for the defendants, it is

ORDERED and ADJUDGED that the Judgment in this action of Mr. Justice Bertram Harnett, dated February 13, 1974, and entered February 14, 1974, as modified by the order of the Appellate Division, dated October 28, 1975, be and the same hereby is amended to the extent hereinafter set forth; and it is further

ORDERED and ADJUDGED that the complaint against the defendant ARTHUR ZIMMERMAN be and the same hereby is dismissed on the merits, and it is further

ORDERED and ADJUDGED that the adoption of the ordinances, to wit: Chapter 9, Article 1, Section 9-106.6 and Chapter 9, Article 1, Section 9-108 of the Municipal Code of the City of Long Beach, by the Common Council of the City of Long Beach, New York, are valid exercises of municipal authority to regulate building construction and usage, and it is further

ORDERED and ADJUDGED that the said sections of the Municipal Code are constitutional and valid as the same apply to

premises known as 154 East Park Avenue, Long Beach, New York, and it is further

ORDERED and ADJUDGED that on the basis of all the credible evidence, the Court concludes that the fire damage to the subject building did not exceed more than one-half of its market value prior to the fire.

Ordered and Adjudged that upon application by plaintiffs, an appropriate building permit shall be issued by defendant, The City of Long Beach.

ENTER:
/s/ Robert C. Meade
J.S.C.

GRANTED
JUN 28 1978
HAROLD W. McCONNELL
Clerk

ENTERED
JUN 30 1978
HAROLD W. McCONNELL
County Clerk of Nassau County

SUPREME COURT — STATE OF NEW YORK

PRESENT:
HON. ROBERT C. MEADE, Justice.

---X

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Plaintiffs,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Defendants.

---X

Approximately eight months subsequent to the Court's issuance of its memorandum decision plaintiffs and defendants presented their respective judgments for signature. A review of the judgments and a supporting affidavit created an issue relating to a claim for damages by the plaintiffs. A hearing date was scheduled and after an adjournment, based upon the illness of one attorney, the attorneys for all parties appeared before the Court on May 11, 1978. The attorneys were unprepared to present evidence but did argue the merits of their positions based upon their interpretations of the controlling legal principles. Time was then given for the submission of memoranda of law.

The Court has both reviewed the memoranda and weighed the arguments of the respective attorneys.

In its order, dated October 25, 1975, remanding the matter to this Court, the Appellate Division specifically deleted the award for damage costs from the judgment, which had been the subject of appeal and stated that "the award of damages for expenses incurred by plaintiffs as a result of the erroneous issuance of the building permit was improper." *Rottkamp v. Young* (21 AD2d 373, affd. 15 NY2d 831) was cited as controlling.

Based upon the aforesaid authority, the Appellate Division order and the supported arguments of all parties, this Court is of the opinion that an award of damages would be improper in this case.

The Court is not persuaded by the plaintiffs' attorney's suggestion that recent federal decisions overrule the authority of the *Rottkamp* case, as cited by the Appellate Division in this matter.

A judgment has been signed herewith.

ROBERT C. MEADE
J.S.C.

Dated: June 23, 1978

MEMORANDUM

SUPREME COURT, NASSAU COUNTY
SPECIAL TERM PART, V-E
By: MEADE, J.
Dated: June 17, 1977
Index No. 15084/72
Calendar No. S-5612

---X

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Plaintiffs,

vs.

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Defendants.

---X

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Attorney for Defendants
By: SAMUEL UNGAR, ESQ.,
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One West Chester Street
Long Beach, New York 11561

Plaintiff, 154 East Park Avenue Corp., is the owner of what was a three-story building, located in Long Beach and utilized for mixed commercial and residential purposes when a fire partially destroyed it on January 11, 1972. The building had a non-conforming use at the time of the fire because it had been occupied by both commercial and residential tenants prior to the enactment by the City of Long Beach of a zoning ordinance prohibiting such a mixed use.

This matter was remanded by the Appellate Division to this Court for "a hearing and determination as to whether the fire damage to the subject building exceeded more than one-half of its market value prior to the fire."

The Municipal Code of the City of Long Beach § 9-106.6 provided that "any non-conforming building damaged by fire or act of God to an extent not exceeding one-half its value or one-half its cubical contents, may be repaired within six (6) months subject to the provisions of the Building Code and used as before." On July 5, 1972 a building permit was issued for restoration of the building but was revoked approximately two and a half months later on the ground that it had been issued in violation of the Municipal Code.

At the hearing before this Court the parties presented evidence relating to the building's market value immediately prior to the fire and the damages thereafter sustained.

While the real estate appraisers both arrived at the same gross rental figure for the building immediately prior to the fire, plaintiffs' appraiser utilized a gross rent multiplier to arrive at his final selection of value. Defendants' appraiser's use of the capitalization of net income is a more accepted method of real estate appraisal and will be adopted by this Court in its determination

that the subject building had a value of $25,000 immediately prior to the fire.

In their attempt to prove fire damage to the building defendants produced a licensed engineer who had neither seen the building prior to the fire nor until more than nine months later when admittedly there was some evidence of demolition and repairs. His estimates of damage were expressed in terms of "cubical contents" and allegedly based on his observations and other information including measurements and photographs. This method of damage computation was expressly rejected by the Appellate Division in its decision remanding the matter to this Court.

Plaintiffs' damage witness, a building contractor, testified that he personally inspected the building after the fire and prior to any repairs being made and gave the plaintiff-owner an estimate of the cost of repairs. This estimate ranged between $6,700 and $7,700 depending upon whether the contractor was to be responsible for rubbish removal and include metal stairs in the building. At the hearing he testified that an added cost of $300 for painting may have to be included. The highest cost of repairs therefore would be $8,000. The Court accepts the testimony of this witness as being the only acceptable evidence of damage submitted. It is apparent that this figure is less than 50% of the determined market value.

Based upon all the credible evidence, the Court concludes that the fire damage to the subject building did not exceed more than one-half of its market value prior to the fire.

The foregoing constitutes the decision of the Court pursuant to CPLR 4213.

Settle judgment on notice in accordance herewith.

ROBERT C. MEADE
J.S.C.

49 A.D.2d 949 (374 NYS2d 569)

154 EAST PARK AVENUE CORP. et al.,

Appellants-Respondents,

v.

THE CITY OF LONG BEACH et al.,

Respondents-Appellants.

Supreme Court, Appellate Division, Second Department.
Oct. 28, 1975.

Eugene Prosnitz, Brooklyn, for appellants-respondents.

Morris H. Schneider, Corp. Counsel, Long Beach (Stephen Jenkins, Asst. Corp. Counsel, Long Beach, of counsel), for respondents-appellants.

Before MARTUSCELLO, Acting P.J., and LATHAM, COHALAN, MARGETT and BRENNAN, JJ.

MEMORANDUM BY THE COURT

In an action *inter alia* (1) to permanently enjoin defendants from preventing plaintiffs from reconstructing certain premises and (2) for money damages, the parties cross-appeal from a judgment of the Supreme Court, Nassau County, dated February 13, 1974, which, after a nonjury trial, *inter alia*, declared (1) that certain ordinances are valid and constitutional and (2) that defendants' revocation of a building permit was not arbitrary or improper.

Judgment modified, on the law, by deleting therefrom the fourth, fifth and sixth decretal paragraphs. As so modified, judgment affirmed, without costs, and case remanded to Special Term for (1) a hearing and determination as to whether the fire damage to the subject building exceeded more than one-half of its market value prior to the fire and (2) the entry of an appropriate amended judgment in accordance therewith.

Plaintiff 154 East Park Avenue Corp. is the owner of a building in the City of Long Beach which was damaged by fire on January 11, 1972. The building had a nonconforming use because it was occupied by both residential and commercial tenants, whereas a zoning ordinance, enacted after the commencement of such use, prohibited such a mixed use. Plaintiff SLC Construction Corp., on July 5, 1972, was issued a building permit for the restoration of the building to its prior nonconforming use. The building permit was revoked on September 21, 1972 on the ground that it was issued in violation of an ordinance which provided that "any nonconforming building damaged by fire or act of God to an extent not exceeding one-half its value or one-half its cubical contents, may be repaired within six (6) months subject to the provisions of the Building Code, and used as before" (Municipal Code of City of Long Beach, § 9-106.6).

The trial court found that the revocation was proper as the damage to the building exceeded one-half of its value and one-half of its cubical contents; it awarded damages to plaintiffs for expenditures made by them in reliance upon the building permit issued on July 5, 1972, 76 Misc.2d 445, 350 N.Y.S.2d 974.

[1, 2] We note that, pursuant to the above-cited ordinance, a nonconforming building which is damaged by fire may not be repaired and used as it was before the fire if the damage exceeds more than one-half of its value or, alternatively, if such damage

exceeds more than one-half of its cubical contents. Ordinances using 50% of "value" or 50% of "volume" as a criterion in determining whether an owner shall be permitted to reconstruct a partly destroyed building have been held not to be unreasonable on their face (see *Matter of Bobandal Realties v. Worthington*, 21 A.D.2d 784, 250 N.Y.S.2d 575, affd. 15 N.Y.2d 788, 257 N.Y.S.2d 588, 205 N.E.2d 685). We believe the city sought to enact an ordinance which employed both the "value" and "volume" criteria as independent standards. Moreover, we conclude that the term "value", as used in the ordinance, must be construed to mean market value prior to the fire (cf. *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 279; *Matter of Jetter v. Hofheins*, 190 Misc. 99, 70 N.Y.S.2d 808).

[3] In the circumstances of this case, the evidence does not support the trial court's conclusion that the fire damage exceeded one-half of the cubical contents of the building; the mathematical computations utilized to sustain that finding were not made until approximately nine months after the fire; and then only after substantial demolition and partial reconstruction pursuant to the building permit made inspection of the damaged premises an impossibility. However, the case should be remanded for a hearing to determine whether the fire damage to the building exceeded more than one-half of its market value prior to the fire. No testimony was offered to establish such market value.

[4] Finally, we observe that the award of damages for expenses incurred by plaintiffs as a result of the erroneous issuance of the building permit was improper (*Rottkamp v. Young*, 21 A.D.2d 373, 249 N.Y.S.2d 330, affd. 15 N.Y.2d 831, 257 N.Y.S.2d 944, 205 N.E.2d 866).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---X

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.

Plaintiffs,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Defendants.

---X

JUDGMENT AND NOTICE OF SETTLEMENT
Index No. 15084/72

The issues in the above entitled action having come on for trial before Mr. Justice BERTRAM HARNETT at a Special Term Part III of this Court, held in and for the County of Nassau at the Courthouse thereof in the County of Nassau on the 19th, 20th and 21st, 24th and 25th days of September, 1973 and the plaintiffs having appeared by SHAPIRO, SCHLISSEL, SHIFF, BEILLY & FOX, ESQS., by JOEL HELD, ESQ. of counsel, their attorneys and the defendants having appeared by DAVID J. WEINBLATT, ESQ. Corporation Counsel of the City of Long Beach, New York, their attorney and the allegations and proofs of the respective parties having been duly heard and considered, and the issues having been tried and the Court having duly made and filed its decision dated December 21, 1973 directing Judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that the complaint against the defendant ARTHUR ZIMMERMAN be and the same hereby is dismissed on the merits, and it is further

ORDERED, ADJUDGED AND DECREED that the adoption of the Ordinances, to wit: Chapter 9, Article 1, Section 9-106.6 and Chapter 9, Article 1, Section 9-108 of the Municipal Code of the City of Long Beach, by the Common Council of the City of Long Beach, New York are valid exercises of municipal authority to regulate building construction and usage, and it is further

ORDERED, ADJUDGED AND DECREED that the said sections of the Municipal Code are constitutional and valid as the same apply to premises known as 154 East Park Avenue, Long Beach, New York, and it is further

ORDERED, ADJUDGED AND DECREED that the revocation of said building permit by the defendants was not arbitrary nor improper but was valid pursuant to said applicable ordinances, and it is further

ORDERED, ADJUGED AND DECREED that the reissuance of the building permit and injunctive relief demanded by plaintiff is denied, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs, 154 EAST PARK AVENUE CORP. and SLC CONSTRUCTION CORP. do recover of the defendant, CITY OF LONG BEACH, the sum of Five Thousand Seven Hundred Eighty-Five and 32/100 ($5,785.32) Dollars and that execution hereon be stayed until the expiration of 30 days from entry of this judgment and service of a copy thereof with written notice of its entry on the respective attorneys for the plaintiffs and defendants

herein; after which, if this judgment or any part thereof remains unpaid, said plaintiffs shall have execution therefor.

ENTER

JUDGMENT SIGNED THIS 13th DAY OF FEBRUARY, 1974

BERTRAM HARNETT
J.S.C.

GRANTED
FEB 14 1974
HAROLD W. Mc CONNELL
CLERK

DECISION (76Misc.2d445; 350 NYS2d 974) (12/21/73)

350 NEW YORK SUPPLEMENT, 2d SERIES

BERTRAM HARNETT, Justice.

The tale of woe that followed the erroneous issuance of a building permit in Long Beach forms the subject of this legal visitation. Among other things, it finds a City vainly trying to hide behind the notice provisions of General Municipal Law § 50-e when challenged for the administrative miscarriage of its own key officials.

154 East Park Avenue Corp. ("154") owns a building in Long Beach, New York that was damaged by fire on January 11, 1972. The building was a mixed residential and commercial three-story structure that was non-conforming in the sense that a city ordinance enacted after the original construction of the building prohibited such "mixed" usage.

Seeking to restore the damaged portions, the corporation applied for a building permit and obtained one on July 5, 1972, issued by the Building Commissioner of the City of Long Beach, Arthur Zimmerman.

Then, in September 1972, after reconstruction was started, the City revoked the permit claiming it had mistakenly granted it in the first place. The error claimed was that over 50 per cent of the structure had been damaged by fire and a Long Beach ordinance allowed rebuilding of non-conforming structures only where not more than one-half of its value or cubical contents was damaged.

154 sued the City and the Building Commissioner, seeking an injunction directing the City to reissue the original permit. Failing that, it seeks damages for expenditures made in reliance on the issued-then-withdrawn permit.

A full non-jury trial was held, and at the completion of all proof, the Court dismissed the action personally against Commissioner Zimmerman on the grounds that (1) in issuing the permit he was acting in his discretion within the scope of his employment; and (2) absent any demonstrated fraud or bad faith, he then could not be held liable in damages. This leaves the case against the City.

A. *Attempt to Have Erroneous Permit Reissued*

First, we consider whether injunctive relief is appropriate here to direct reissuance of the permit.

1. *The Governing Ordinances*

154's building stood before the adoption of, but failed to conform to, Section 9-106.6 of the Municipal Code of the City of Long Beach which provides, in pertinent part:

"Anything contained in this code to the contrary notwithstanding, no building or premises shall be used and no building or structure shall hereafter be altered or hereafter erected which is intended or designed to be used for both residential and business or commercial purposes."

In defining the conditions for rebuilding damaged nonconforming buildings, the Municipal Code, § 9-108, provides, in pertinent part:

"Any non-conforming building damaged by fire or act of God to an extent not exceeding one-half its value or one-half its cubical contents, may be repaired within six (6) months subject to the provisions of the Building Code, and used as before."

Since Section 9-108 is permissive, applications for variance or special exception may be available, but no such special applications have been demonstrated here. The Court must proceed then strictly on ordinance applicability.

2. *Fire Damage Exceeded the Requisite One-Half Quantum*

The testimony of experts, in particular, the engineer retained by the City to inspect and analyze the percentage damage to this building, and the pictures submitted, persuade the Court that over 50 per cent of the building's value and cubical contents had been destroyed. Burning, charring, and scorching were evident in many places. The third floor was apparently almost totally destroyed, the second floor and staircase severely damaged, and fire and smoke impact were evident even on the first level. And, the water damage was also extensive. The repair costs of plumbing, electrical work and capentry would have far exceeded one-half of the value of the building. And, the inside volume damaged exceeded one-half of the whole.

Moreover, at the request of the parties, and in their presence, the Court conducted an on-site view of the premises in question.

The Court has no doubt as to the scope of the destruction, unquestionably in terms of value, and convincingly in terms of cubical contents.

3. *The Ordinances Are Not Unconstitutional*

[1] Both City ordinances are valid exercises of municipal

authority to regulate building construction and usage. See, Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632.

a. *Effect of Major Destruction on Non-Conforming Use*

Section 9-108 is intended to strike an equitable balance in allowing rebuilding of a non-conforming structure with only relatively minor damage done to it. The continued allowance of a use, valid when a building was raised but violative of later legal proscriptions, is rooted in equitable consideration and fairness. It would not be fair, indeed would deprive a person of property without due process, to prosecute or require substantial building alteration under a law not in force at the time of initial construction. See, Bexson v. Board of Zoning and Appeals, Town of Hempstead, 28 A.D.2d 848, 281 N.Y.S.2d 569, affd., 21 N.Y.2d 961, 289 N.Y.S.2d 990, 237 N.E.2d 239. But, where much of the structure is destroyed by accident, the owner becomes more like a new builder, starting from scratch. At some point of damage, it becomes reasonable to mandate compliance with all existing building codes even though some of the surviving frame and beams, in fact, predated in construction the now enforced requirements. The loss of a right to continue a non-conforming use is reasonably related to the lessened existence of the original structure investment, after the fire.

We cannot say that the 50 per cent cut-off point is unreasonable or confiscatory in either value or cubical content. See, Matter of Off Shore Rest. Corp. v. Linden, 30 N.Y.2d 160, 331 N.Y.S.2d 397, 282 N.E.2d 299; Matter of Bobandal Realties, Inc. v. Worthington, 21 A.D.2d 784, 250 N.YS.2d 575. In essence, the fortuitous fire, not the later municipal enactment, is primarily responsible for loss of the continued use.

There is no absolute vested right to totally rebuild a non-conforming structure. Entitlement of that sort relates more to preserving the original structure and making minor repairs to it, and when that structure is substantially damaged by fire, the entitlement may likewise disappear in the flames. See, Matter of Koeber v. Bedell, 254 App.Div. 584, 3 N.Y.S.2d 108, affd., 280 N.Y. 692, 21 N.E.2d 200.

b. *Mixed Use*

And, likewise, Section 9-106.6 of the Municipal Code, the ordinancial prohibition against mixed residential and commercial uses in a single structure, serves to keep apart living and working population, activity and enclosures, and to unify the uses existent in any one building. It is principally designed to prevent commercial intrusion into a residential structure where the particular zoning district allows both kinds of uses generally. In all, the mixed use prohibition cannot be said to ignore the common good or to be unconstitutional. See, People v. Calvar Corp., 286 N.Y. 419, 36 N.E.2d 644; Brous v. Town of Hempstead, 272 App.Div. 31, 69 N.Y.S.2d 258, amended, 272 App.Div. 777, 70 N.Y.S.2d 576.

Nor has there been sufficient attempt by 154 to show that the application of these ordinances is confiscatory or deprives it of any reasonable use of, or economic return from, the property. See, Matter of Fulling v. Palumbo, 21 N.Y.2d 30, 286 N.Y.S.2d 249, 233 N.E.2d 272.

4. *No Authority to Compel Disregard or Waiver of Ordinance*

154 still contends that Commissioner Zimmerman's initial granting act, even if found improper under valid ordinances, nonetheless binds the city to accept and continue the permit.

[2] It is well settled that a municipality is not bound or estopped by the acts of its own employees in erroneously granting a building permit that was not authorized by existing ordinances. Premium Bond Corp. v. City of Long Beach, 249 App.Div. 756, 291 N.Y.S. 834; see, N.Y. City Employees' Retirement Syst. v. Eliot, 267n N.Y. 193, 196 N.E. 23. Where a municipal worker improperly applies the city law, and someone relies upon that application, the law does not become a nullity; the employee action does. Altschul v. Ludwig, 216 N.Y. 459, 111 N.E. 216; Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619.

[3] Accordingly, the revocation by the City of the initial building permit was valid, indeed even required as a necessary act to enforce the ordinance previously misapplied.

B. *Municipal Money Damage Liability*

[4] The Court has found, in dismissing this action against Commissioner Zimmerman personally, that his erroneous granting of the building permit was discretionary and was not wilful or malicious. Rottkamp v. Young, 21 A.D.2d 373, 249 N.Y.S.2d 330, affd., 15 N.Y.2d 831, 257 N.Y.S.2d 944, 205 N.E.2d 866; see, Article 1, § 7-126, Municipal Code of City of Long Beach.

We do believe, however, that his assessment of the fire damage was improper since the extent of destruction easily and obviously surpassed the half-way mark. But, there remains the question of whether a municipality is answerable in money damages for the expenses incurred in reliance on the original permit which is later revoked because of city misjudgment in the first place.

1. *Terms of Municipal Liability*

In New York, we have long since passed the era of sovereign

immunity protection of municipalities from liability occasioned by acts of their employees. See, Court of Claims Act § 8; General Municipal Law § 50 et seq. Here, a permit was issued by the Building Commissioner allowing a proposed rebuilding which subsequently turned out to be invalid. When the permit was revoked, monies had already been expended in the interim towards the stipulated proposal. The causal relation is direct; the damages exposure of the City is evident.

Contrary to the negative projection envisioned by the City, liability here allows for just recompense and encourages the City to supervise carefully the acts of its officers and employees with a view to avoiding law suits and adverse money judgments. Total immunity from liability would encourage municipal impunity towards its residents, as then, little or no responsibility for wrongful acts would attach.

Here, moreover, issuance of building permits is a form of warranty given by the City which certifies approval of the contemplated plans and usage. There is an implied understanding that the permit will hold up and that the municipal officer had authority to use it. The implication of this agreement is borne in equity and fairness to the citizen who requests and obtains the permit with full disclosure of his planned expenditures in following up to build. It lies less in the wrongful aspect of municipal action. It comes out of a sense of justice incidental to the main action in equity seeking permit reinstatement.

2. *Municipal Law § 50-e Is Neither Sword Nor Shield to the City*

[5] The City counters that 154 has failed to serve a notice of claim as required by Section 50-e of the General Municipal Law.

However, Section 50-e requires a notice only where a tort claim is asserted.

Since the action for damages is found to be in quasi-contract and warranty, and incidental to the equitable declaratory judgment action, no notice of claim is required. Fontana v. Town of Hempstead, 18 A.D.2d 1084, 239 N.Y.S.2d 512, affd., 13 N.Y.2d 1134, 247 N.Y.S.2d 130, 196 N.E.2d 561; Accredited Demolition Const. Corp. v. City of Yonkers, 37 A.D.2d 708, 324 N.Y.S.2d 377.

Section 50-e is a harsh provision not competing for the most just award of our times. But, considering its purposes, the statute does not really apply here anyway. The statute is designed to forewarn a municipality of accidents and potential liability from remote municipal property, so that witness statements and investigation can be pursued. It is basically an injury to person or property which is typically concerned. Here, the occurrences were adminsitrative transactions done at the very heart of City authority, continuously within the knowledge of its officials and recorded in files at the Building Department right in the City Hall. The occurrence is recent. There is no concern about the City's lack of awareness. The statute does not apply, either in letter or principle. See, Zillman v. Meadowbrook Hospital, 73 Misc.2d 726, 342 N.Y.S.2d 302.

3. *Damages*

[6] 154 claims its damages to be $14,155.73. However, the Court eliminates the costs of debris removal, cleanup, and safeguarding, since those would have been expended anyway by the destruction. The Court will not hold the City to reimburse lost profits during the delay in construction since they are speculative. It will not allow the corporate expenses claimed by 154.

Accordingly, judgment is granted declaring that the respondent's revocation of the building permit on September 21, 1972 was not arbitrary or improper, but was valid, and that repsondent City is liable to plaintiffs for $5,785.32 in consequential damages, representing the $4,864.75 obligation to the contractor Steins, $200 to the engineer Ostfeld, $550 to the draftsman Dell Nunzio, and $170.57 in Long Beach permit fees.

COMPLAINT

SUPREME COURT: NASSAU COUNTY

----------X

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Plaintiffs,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Defendants.

----------X

Plaintiff, by their attorney, SEYMOUR M. CUSTEN, complaining of the defendants, allege:

1. At all times hereinafter mentioned plaintiffs were, and still are, domestic corporations, organized under the laws of the State of New York.

2. At all times hereinafter mentioned, plaintiff 154 EAST PARK AVENUE CORP. was and still is the owner in fee of the premises known as 154 East Park Avenue, Long Beach, N.Y., and the plaintiff SLC CONSTRUCTION CORP. was a contractor engaged by plaintiff 154 EAST PARK AVENUE CORP. to repair premises 154 East Park Avenue, Long Beach, N.Y.

3. That the defendant THE CITY OF LONG BEACH is a municipal corporation.

4. That at all the times hereinafter mentioned the defendant ARTHUR ZIMMERMAN was and still is the Building Commissioner of the CITY OF LONG BEACH.

5. That, on or about January 11, 1972, the premises 154 East Park Avenue, Long Beach, N.Y., a three story building occupied by a store and apartments, was partially damaged by fire.

6. Shortly thereafter the plaintiff owner, through its servants, agents or employees prepared proposed plans for repairing the damaged premises and presented same to the defendant ZIMMERMAN, as Building Commissioner, for the purpose of obtaining a building permit as required by the Laws and Ordinances of the CITY OF LONG BEACH.

7. In the discussions thereon the defendant ZIMMERMAN informed the agent of plaintiff owner that the City was endeavoring to limit the size and use of buildings in the area of the subject premises and that the defendants desired that only the store, not the apartments, should be repaired, removing the rest of the structure.

8. That said premises, prior to the fire, were lawfully used for both the store and apartments.

9. That defendant ZIMMERMAN hampered and delayed the issuance of the necessary building permit in an attempt to force and compel plaintiff owner to demolish the existing structure before issuance of such permit; and to delay the needed repairs.

10. That the plaintiff owner refused to so demolish and insisted upon its right to restore the building to its original form and use.

11. That all during this discussion period, plaintiff owner's losses and damages from lack of rental income from the premises continued to mount.

12. That finally the defendant ZIMMERMAN informed plaintiff owner that if plaintiff owner agreed and consented with the defendants to eliminate the third floor of the premises, a building permit would be issued.

13. That in order to stop the continuing losses plaintiff owner expended large sums of money for engineering reports and building plans, and finally agreed to accept the onerous condition of eliminating the top floor.

14. That on July 5, 1972, the defendants issued the necessary building permit to commence the work contemplated.

15. That plaintiffs thereupon procured and entered into the necessary contracts, hired labor and bought materials and commenced work pursuant to the plans and building permit.

16. That on September 21, 1972, while the work was in progress, the defendants, by their servants, agents or employees, appeared at the subject premises and ordered the work stopped and delivered, by hand, to plaintiff owner a letter revoking the building permit. A copy of said letter is hereto attached, made part hereof, and marked Exhibit 1.

17. That said order by defendants was wanton, wilful, improper and illegal act of the defendants, individually and jointly.

18. That the use of the premises for a store and apartments was a proper and legal use, continued long prior to the Statutes and ordinances set forth in Exhibit 1.

19. That the interrupted usage caused by the fire did affect the continuity of the usage, and the plaintiff had a legal right to repair the premises to its original form, whether fifty percent was or was not destroyed by the fire.

20. That, as a matter of fact, over fifty percent of the building was not destroyed by fire.

21. That the delay in commencing the repair work was occasioned by the wilful, illegal and improper actions of defendant ZIMMERMAN in failing to issue the necessary building permit when requested, and in harassing the plaintiff owner by his illegal and improper demands.

22. That the agreement made by plaintiff owner with the defendants to eliminate the top floor was entered into by plaintiff owner under duress.

23. That the building permit issued by defendants was valid and proper.

24. That the Ordinances referred to by defendants in Exhibit 1 are ex post facto to the owner of the subject premises, and are otherwise contrary to law in that they are a form of spot zoning applicable solely to the single block on which the premises stand, and otherwise inapplicable to the subject premises and its repair and rehabilitation.

25. That the agreement by plaintiff owner to limit the use of its building was obtained from it by defendant ZIMMERMAN by fraud, duress and misrepresentation to plaintiff owner that it could immediately start to rehabilitate the premises.

26. That the refusal to allow reconstruction or rehabilitation of the premises under color of local statutes is an illegal appropriation by the defendant city of plaintiff owner's property without just and fair compensation, contrary to the laws and constitution of the United States and of the State of New York.

27. That the actions of the defendants have caused and continue to cause great and continuing damages and loss to the plaintiffs.

28. That the defendants threaten and continue to threaten to continue to prevent plaintiff owner from rehabilitating and using the subject premises.

29. That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray for a judgment:

1. Permanently enjoining the defendants from, in any manner preventing the plaintiffs from reconstructing the subject premises in accordance with the building permit issued July 5, 1972.

2. Enjoining the defendants from requiring that the subject premises to be limited to two floors and directing that plaintiffs be permitted to file and defendants ordered to accept an application for reconstruction and rehabilitation of the premises substantially as they existed prior to the fire of January 11, 1972, and directing that a new building permit be issued for same, for the same usage as prior to the aforesaid fire.

3. Awarding plaintiffs judgment in the sum of $50,000.00 against the defendant ZIMMERMAN.

4. Awarding judgment for the sum of $50,000.00 against the defendants for the temporary loss of use of the property.

5. Awarding judgment for the sum of $100,000.00 against the defendant THE CITY OF LONG BEACH for its confiscation and taking of property and its use.

6. And for such other relief as may be proper, together with the costs and disbursements of this action.

Dated: Long Beach, N.Y.
September 22, 1972

SEYMOUR M. CUSTEN
Attorney for Plaintiffs
Office and Post Office Address
161 East Park Avenue
Long Beach, N.Y. 11561
432-0100

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

81-15

IN THE

Supreme Court of the United States

October Term, 1981

No. ____

154 EAST PARK AVENUE CORP. and
SLC CONSTRUCTION CORP.,

Petitioners-Appellants,

—against—

THE CITY OF LONG BEACH and
ARTHUR ZIMMERMAN,

Respondents-Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

ELI KRAMER
Corporation Counsel of
the City of Long Beach
Attorney for
Respondents-Respondents
City Hall
1 West Chester Street
Long Beach, New York 11561
(516) 431-1000

QUESTIONS

1. Is there a substantial constitutional question involved?

2. Is a municipality responsible in damages where the Building Commissioner, acting in good faith and in his discretion, erroneously revokes a building permit?

3. Does the Supreme Court of the United States have jurisdiction of this matter which has been thoroughly litigated in the Courts of the State of New York and finally decided by the highest Court of the State of New York?

4. Did the Petitioners-Appellants apply within ninety (90) days for the relief sought in the subject Petition pursuant to Title 28 U.S.C.A. Section 2101, subdivision (c)?

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PRELIMINARY STATEMENT

The Supreme Court of the United States should deny the Petitioners-Appellants a writ of certiorari on the grounds that there is no substantial constitutional question involved herein.

The sole allegation in petitioners-appellants' complaint, that refers to the Constitution of the United States, is made in paragraph 26, (page 43 of Petitioners-Appellants' Appendix). The said paragraph states:

> "That the refusal to allow reconstruction or rehabilitation of the premises on the color of local statutes is an illegal appropriation by the Respondent, City, of Petitioner owner's property without just and fair compensation, contrary to the laws and Constitution of the United States and the State of New York."

The Courts of the State of New York rejected this allegation *in toto.*

The Petitioners-Appellants never pleaded any violation of Title 42 U.S.C. 1983 in its pleadings and in spite of the fact that Petitioners-Appellants' Brief in the Court of Appeals contained numerous arguments that the Petitioners-Appellants were entitled to collect damages pursuant to said Section, the Court of Appeals held that the Petitioners-Appellants were not entitled to any damages. Even if the Petitioners did plead that the Respondents were liable for damages under 42 U.S.C. 1983, they could not and would not have sustained this contention.

It would appear that the Court of Appeals rendered its decision on February 17, 1981 and that Title 28 U.S.C.A., Section 2101 requires that an appeal to the Supreme Court be

taken or applied for within ninety (90) days after the entry of such judgment or decree. More than ninety (90) days having elapsed since the date of the decision appealed from, the present application must be rejected.

STATEMENT OF FACTS

Petitioner-Appellant, 154 EAST PARK AVENUE CORP., was the owner of certain premises located at 154 East Park Avenue, Long Beach, New York.

Prior to January 11, 1972, the within premises was a three story building occupied by a store on the ground or street floor and by apartments on the second and third floors. On January 11, 1972, the said premises were substantially damaged by fire.

On July 5, 1972, the Petitioner-Appellant, SLC CONSTRUCTION CORP., applied for and was issued a permit by the Long Beach Building Department to renovate and restore the premises to its non-conforming use.

On September 21, 1972, the Respondent-Respondent, CITY OF LONG BEACH, by its Building Commissioner, Arthur Zimmerman, revoked the said building permit on the grounds that the permit was issued in error in that the granting of the permit violated §9-108 of the Code of Ordinances of the City of Long Beach. Said Section states that:

> "Any non-conforming building damaged by fire or act of God to an extent not exceeding one-half its value or one-half its cubicle contents may be repaired within six months subject to the provisions of the building code and used as before."

The Building Commissioner, after reviewing the pertinent data including Fire Department reports and Building Department reports, concluded that the building was damaged by more than one-half of its value (market value).

The Petitioners-Appellants served a notice of motion on September 22, 1972, requesting a preliminary injunction forbidding the Respondents-Respondents from interfering with the continued construction of 154 East Park Avenue, Long Beach, New York, together with a summons and verified complaint seeking a permanent injunction enjoining the Respondents-Respondents from preventing the Petitioners-Appellants from reconstructing the subject premises in accordance with the building permit issued July 5, 1972. In addition, the complaint demanded monetary damages.

On or about November 11, 1972, the Respondents-Respondents served an answer on the Petitioners-Appellants.

On October 17, 1972, the motion for a preliminary injunction was denied by the Supreme Court, Nassau County. Mr. Justice Harnett, after a trial without jury, upheld the Respondents-Respondents' denial of the permit on the ground that the building was destroyed by more than 50%, and at the same time concluded that the actions of the Building Commissioner were performed in good faith. However, the Petitioners-Appellants were awarded $5,872.32 in consequential damages (B-15-20).

Both sides appealed to the Appellate Division, and the Appellate Division remanded the matter to Special Term for a hearing and determination as to whether the fire damage to the subject building exceeded more than one-half of its market value prior to the fire. In addition, the Appellate Division

reversed the award of consequential damages (B-5 & 6).

On remand, the matter was tried before the Honorable Robert C. Meade, Justice of the Supreme Court, Nassau County, who, after a trial without jury, concluded that the market value of the building prior to the fire was $25,000 and that based on the testimony of the second trial, the fire damage to the building did not exceed more than one-half of its market value prior to the fire (A-2-4).

On the first trial, Petitioners-Appellants' witnesses testified that the cost of restoring the building to its original use was in excess of $20,000. It is readily apparent that Mr. Justice Meade did not consider the testimony offered at the first trial, but solely that introduced at the second trial.

Petitioners-Appellants once again sought damages for the revocation of the building permit and Mr. Justice Meade conducted a hearing at which both sides presented oral argument and subsequently submitted briefs. Mr. Justice Meade determined that as a matter of law the Petitioners-Appellants were not entitled to recover damages (A-5 & 6).

Petitioners-Appellants appealed to the Appellate Division for a second time and once again the Appellate Division, in affirming Justice Meade's decision, held the Petitioners-Appellants were not entitled to damages.

Petitioners-Appellants thereafter appealed to the Court of Appeals and the Court of Appeals on February 17, 1981 unanimously affirmed the decision of the Appellate Division. The Petitioners-Appellants then moved for an order granting reargument, and upon reargument, sought an order remanding the matter for trial on the issue of damages. On

April 9, 1981, the Court of Appeals denied Petitioners-Appellants motion for reargument with costs and disbursements.

POINT I

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED.

The sole allegation contained in Petitioners-Appellants' complaint which refers to the Constitution of the United States is a general statement contained in paragraph 26 of the complaint (page 43, Petitioners-Appellants' Appendix) that the Respondents-Respondents actions constitute a violation of the Constitution of the United States and of the State of New York. The Court of Appeals rejected this argument in affirming the Appellate Division's denial of damages. There is no substantial constitutional question which should be reviewed by the Supreme Court of the United States. There was no allegation contained in Petitioners-Appellants' complaint that the actions of the Respondents-Respondents constitutes a violation of Title 42 U.S.C. 1983. Even had the Petitioners-Appellants pleaded a violation of said Section, the Respondents-Respondents did not violate said Section despite the extension of liability enunciated by the various recent Supreme Court cases.

In the instant case, the Building Commissioner resolved a very difficult factual question after examining all of the applicable and pertinent data and concluded in good faith that the permit originally issued to the Petitioners-Appellants should be revoked. There was no illegal policy or custom involved, and there were no illegal ordinances or statutes involved. The Supreme Court in *Jane Monell, et al., Petitioner*

v. *Department of Social Services of the City of New York*, 436 U.S. 658, stated:

> "We conclude, therefore, that a local government may not be sued for any injuries inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an enemy is responsible under Section 1983."

In another fairly recent case entitled *George D. Owen, Petitioner* v. *City of Indianapolis, Missouri, et al.*, 445 U.S. 624, the Court reaffirmed the rationale of the *Monell* case by concluding:

> "The offending official, so long as he conducts himself in good faith may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy'. (*Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658.)"

POINT II

A MUNICIPALITY IS NOT RESPONSIBLE IN DAMAGES WHERE THE BUILDING COMMISSIONER, ACTING IN GOOD FAITH AND IN HIS DISCRETION, ERRONEOUSLY REVOKES A BUILDING PERMIT.

The Court of Appeals in its decision, rendered February 17, 1981, concluded that the Respondents-Respondents are not responsible for the decision of its Building Commissioner, who acted in good faith and in a quasi judicial capacity. The Court reaffirmed its holdings in *Rottkamp* v. *Young*, 21 A.D.2d 373, affirmed, 15 N.Y.2d 831.

POINT III

THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THIS MATTER WHICH HAS BEEN THOROUGHLY LITIGATED IN THE COURTS OF THE STATE OF NEW YORK AND FINALLY DECIDED BY THE HIGHEST COURT OF THE STATE OF NEW YORK.

POINT IV

THE PETITIONERS-APPELLANTS DID NOT APPLY WITHIN NINETY (90) DAYS FOR THE RELIEF SOUGHT IN THE SUBJECT PETITION PURSUANT TO TITLE 28, U.S.C.A. SECTION 2101, SUBDIVISION (c).

Section 2101 of Title 28 of the U.S.C.A., subdivision (c) states:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The Court of Appeals rendered its decision affirming the decision of the Appellate Division denying Petitioners-Appellants' damages on February 17, 1981. More than ninety (90) days have elapsed since that date and the Petitioners-Appellants time to apply to the Supreme Court for a writ of certiorari has expired.

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